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In the Supreme Court of the United States

OCTOBER TERM, 1952

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. II. 78)[1] is reported at 196 F. 2d 960. The findings of fact, conclusions of law, and order of the Board (R. I. 22–75) are reported at 93 NLRB 1523.

JURISDICTION

The decree of the Court of Appeals (R. II. 90–93) was entered on May 22, 1952. The petition for a writ of certiorari, filed on July 28, 1952, was granted on October 20, 1952 (R. II. 94). The jurisdiction of this Court is invoked under Sec-

[1] The transcript of Record is printed in two volumes, herein designated "R. I." and "R. II."

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tion 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether, when an employer discriminates against a union member by denying him employment because of the employee's failure or refusal to perform an obligation of union membership, a violation of Section 8 (a) (3) is established without independent proof that the discrimination "encouraged" (or "discouraged") the employee immediately affected, or any other employee, to acquire or retain "membership" in the union.

2. Whether the terms of the union-security agreement, which petitioner invoked to justify the discriminatory denial of employment to an employee, required the employer to hire only employees initially selected by the Union.

3. Whether a union's discriminatory refusal to grant an employee clearance for employment constitutes expression of "views, argument, or opinion" protected by Section 8 (c) of the Act.

4. Section 8 (b) (2) of the amended Act makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a) (3)." The final question presented is whether, where a union is charged with violating Section 8 (b) (2), the Board may proceed against the union alone without joining the employer,

against whom no charge was filed, and may enter a back-pay order against the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, before amendment (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and after amendment (61 Stat. 136, 29 U. S. C. Supp. V, 141, *et seq.*), are set forth in the petitioner's brief at pp. 3–8.

STATEMENT

A. The Board's findings of fact and conclusions of law

This proceeding is founded upon a charge filed by Willard Christian Fowler against petitioner, the Radio Officers' Union (AFL) (herein called the Union), alleging that it caused an employer, the Bull Steamship Company (herein called the Company), discriminatorily to refuse him employment.[2] Following the usual proceedings under Section 10 (c) of the Act, the Board issued its findings of fact, conclusions of law, and order on April 18, 1951 (R. I. 22–75). The pertinent findings of fact and conclusions of law may be summarized as follows:

1. As to the hiring contract between the parties

The transactions giving rise to this case took place in the early months of 1948. At that time, the Union held a collective bargaining contract with a number of steamship concerns, one of which was the Bull Steamship Company (R. I.

[2] No charge was filed against the Company (R. I. 78).

44–45; 215–216). The contract, which covered the employment of radio officers on ships of the contracting companies, by its terms required the employers "to select * * * members of the Union in good standing, when available," for employment as radio officers, but the contract expressely reserved to the Company "The right of free selection of all its Radio Officers," and it did not require the Company to leave the selection of its radio officers to the Union (R. I. 44–45; 215–216).[3] Its full relevant terms are as follows (*ibid.*):

ARTICLE I—EMPLOYMENT

> Section 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers, to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agreement, provided such members are in the opinion of the Company qualified to fill such vacancies.
>
> * * * * *
>
> Section 3. When a member of the Union in good standing qualified to fill the vacancy is not available, the Company will notify the Union twenty-four (24) hours in advance before a nonmember of the Union is hired, and give the Union an opportunity to furnish with-

[3] The validity of the union-security provisions of the contract, which was negotiated prior to the effective date of the 1947 amendments to the Act, was preserved by Section 102 of the 1947 Act (R. I. 61).

out causing a delay in the scheduled departure of the vessel a competent and reliable Radio Officer with the license necessary for the position to be filled.

* * * * *

Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing.

Though free under the contract to hire any union operator they chose, the companies usually left their choice of radio officers in the hands of the Union. On occasion, however, the companies exercised their contractual right of "free selection" and made their own choice of radio personnel (R. I. 46; 167–168, 81, 204, 82, 90, 138–139). When vacancies occurred, the employers would either call upon the Union to furnish an unemployed member from its shipping list or would name the union member they wished to hire. The Union, depending upon the type of request, would either dispatch an unemployed member of its own selection for the post or would refer the member specified by the employer, furnishing him with a

written "clearance" (R. I. 45–46; 150, 151–153, 163–165, 167–168, 174–176, 177–178, 193–194, R. II. 35, 64, 77). It was the Union's policy and unwritten rule that members desiring employment should apply for work at the union hall and there await their turn to be dispatched to a job. (R. I. 45–46, 59; 150, 151–153, 127, 163–165, 167, 174–175, 178, 193–194). The Union frowned upon the practice of the companies' exercising their contractual right to name their choice of radio officers. According to the Union's general secretary-treasurer, Fred M. Howe, "some of the members don't think too much of that system" (R. I. 57–58; 167–168). Over the years, the Union came to consider it an offense for a member to solicit or accept an offer of employment directly from a company; this offense was deemed particularly serious when acceptance of such an offer would result in the "bumping" of a fellow member (R. I. 48–49, 59–60; 167–168, 116–117, 89, 154–155, 85, 205, 158–159, 210, 160–161).

In the proceedings below, the Union contended that the aforesaid agreement, as implemented by the practice of the parties, obligated the employers and their prospective employees to conform to hiring hall procedure and that the Union, accordingly, could rightfully refuse to "clear" an employee for a position, even though he was a union member "in good standing," if he had dealt directly with the employer about the prospective job, without prior recourse to the Union's

hiring hall. The Board rejected this contention and found that the contract clearly reserved to an employer the right to hire radio officers of its own choosing, provided only that any prospective employee be a "member" of the Union "in good standing" (R. I. 23–25, 58, 61–63).[4]

2. As to the discrimination against Fowler, the charging party

Fowler, an old employee of the Company (R. I. 46; 80), was a long-time member of the Union and at all times herein material was "in good standing" (R. I. 46; 172, 86–87, 93–95, 206–209). On February 24, 1948, at his home in Miami, Florida, he received a telegram from Robert H. Frey, the Company's radio supervisor, summoning him to New York City for immediate assignment to a job on the Company's ship S. S. *Frances* (R. I, 47; 81, 132, 133, 204). Fowler at once notified the Company that he would accept the job (R. I. 47; 81).

That same day in New York, supervisor Frey notified the incumbent radio officer on the *Frances,* a union member named Kozel, that he was to be replaced by "a man with senior service in the company" (R. I. 46; 143). On the 25th, Fowler came to New York to take up his new assignment. He went to the Union headquarters but was unable to see Union Secretary Howe, who was busy at the time (R. I. 47; 82–83, 115). From there, Fowler went to the S. S. *Frances* where he

[4] Member Murdock dissented on this point (R. I. 31–34).

met Kozel, the radio officer on the preceding voyage (R. I. 46–47; 83, 87, 121, 133–134). Kozel asked Fowler if he had been cleared. Fowler replied in the negative but explained that he had not known there was a radio officer aboard, and suggested that Kozel straighten out the matter with the Union (R. I. 47; 83–84). Kozel reported Fowler's appearance on the ship to the Union that day (R. II. 53). On February 27, Howe, acting without authority and in disregard of the disciplinary procedures prescribed in the Union's by-laws (R. I. 26, 62; 157, 160–162, 210), wired Fowler that he had been suspended from membership in the Union for "bumping" another member and taking the job without clearance (R. I. 47–48; 85, 205).[5] On the same day, Howe advised the Company by wire that Fowler was not in good standing and called the Company's attention to the "clearance" provisions in the agreement (R. I. 47–48; 212, 181–182).

On February 28, Frey learned that Kozel had left the ship with his baggage and had removed his license from the wall (R. I. 135–136). He thereupon called Howe, reported that Kozel had gone, and requested clearance for Fowler on the *Frances* (R. I. 51; 136–137). Howe refused the request (R. I. 51; 137).

[5] The trial examiner, the Board, and the court below agreed that the suspension was null and void, because effected without authority, and found that Fowler remained in good standing as a Union member throughout this period (R. I. 62, 26, R. II. 83).

Fowler too, on February 28 and again on March 1, spoke to Howe concerning the suspension telegram and expressly requested clearance for his employment on the S. S. *Frances* (R. I. 52; 88–90). Howe refused the request, asserting that Fowler had violated the Union's rules by failing to obtain "clearance" (*i. e.*, a referral from the dispatcher at the Union's hiring hall) before arranging for the position with Frey, and by "trying to steal jobs from other members" (R. I. 52–53; 89–92, 127–128). Howe declared that the Union would never again clear Fowler for a position with the Company, but suggested that Fowler might take other jobs which the Union had at its disposal (R. I. 52–53; 90, 92). Fowler elected, instead, to return to his home in Florida for the time being (R. I. 92). Unable to obtain a "clearance" for Fowler, the Company, on March 2, gave the job on the *Frances* to another man who was dispatched by the Union (R. I. 52–53; 137).

On April 22, Fowler returned to New York City and again advised the Company that he was available for work before he reported to the Union (R. I. 54; 95–96, 138). On April 25, Fowler went to the Union hall and told Howe, in effect, that he was looking for a job. Howe told him, "We have plenty of jobs available for you but it still stands as far as the Bull line is concerned, you will be given no clearance for any Bull Line ship" (R. I. 54–55; 96–97, 123–

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124). He added that supervisor Frey had been "making a company stiff" out of Fowler and that he, Howe, intended "to break it up here and now" (R. I. 54–55; 97), overruling Fowler's protest that nothing in the Union's constitution and by-laws precluded him from working for the Company or any other employer he might prefer (R. I. 54; 124). Two days later, a job opened on the Company's ship S. S. *Evelyn*. Frey asked Howe to clear Fowler for the job, but Howe, adhering to his previously announced position, refused to issue the requested clearance. Frey thereupon hired another man dispatched by the Union (R. I. 56–57; 139–140, 141, 148, 202).

On April 26, Fowler had a final interview with Howe in which the Union official censured him for renewing his contacts with Frey and again accused him of trying to "steal jobs" from fellow members of the Union. When Fowler retorted that Howe appeared to be trying to "railroad" him out of the Union, Howe said, "as far as I am concerned you are through," and suggested that Fowler seek membership in the rival American Communications Association if he desired a job (R. I. 56–57; 102–103, 110, 129, 131).

On the foregoing facts, the Board found (R. I. 23–28, 65–68) that the Union, by refusing to "clear" Fowler in both February and April, 1948, caused the Company to discriminate against him by denying him employment. The Board found that this discrimination, based on Fowler's

alleged disloyalty and infraction of the Union's rules, tended to "encourage * * * membership in [a] labor organization" (Section 8 (a) (3) of the Act), even though Fowler himself was already a member of the Union, in the sense that it was "aimed at compelling obedience to union rules" (R. I. 28). The discrimination, demonstrating the Union's strength, was found to encourage "nonmembers to join it" and "other members to retain their membership" (R. I. 67–68). Therefore, the Board concluded, the discrimination against Fowler was proscribed by Section 8 (a) (3) of the Act, and the Union, by causing the Company so to discriminate, violated Section 8 (b) (2). The Board concluded further (R. I. 59–65, 28) that Fowler had the right under Section 7 of the Act to refrain from observance of the Union's rules because such observance was a form of concerted activity, and hence, as the Union restrained and coerced Fowler (by causing him to lose employment) in his exercise of this statutory right, it violated Section 8 (b) (1) (A) of the Act as well as Section 8 (b) (2). The Board rejected (R. I. 23) the Union's contention that the collective bargaining contract immunized its conduct, finding that the contract only made union membership "in good standing"—a condition which was met in Fowler's case—a prerequisite to the employment of radio officers, and did not, in addition, require

conformity with the Union's hiring-hall rules and procedures.

B. The decision of the court below

The court below affirmed the Board's findings and conclusions and enforced the Board's order in full. In its opinion the court expressly agreed with the Board's conclusion that the collective bargaining contract afforded the Union no defense (R. II. 80–83). The court also agreed that the Union-caused discrimination against Fowler, even though Fowler was a member of the Union at the time, had the effect of encouraging "membership" in the Union. In this connection, the court observed that the discrimination "displayed to all non-members the union's power and the strong measures it was prepared to take to protect union members" (R. II. 85).[6]

SUMMARY OF ARGUMENT

I

A. The system of hiring which the Union sought to effectuate, and which it enforced against employee Fowler, required that union members apply only to the Union for assignment to employment, and restricted assignment to members

[6] Although Judge Clark dissented (R. II. 86) with respect to the construction of the contract, being of the view that the contract did provide for a hiring hall, he did not disagree with the conclusion of the Board and the court below on the basic question presented here, whether, absent such a contract, the Union's conduct violated Section 8 (b) (2).

in good standing. The inescapable effect of this system of hiring was to encourage union membership. Non-members seeking employment had no alternative but to join the Union as a prerequisite to obtaining a job; existing members were similarly constrained to retain their membership in order to preserve their opportunity for employment; and, in order to remain eligible for assignment to jobs, members were required to maintain their membership in good standing by complying with the Union's membership rules.

Therefore, the Union's conduct, by depriving employee Fowler of the opportunity to work, was "discrimination in regard to hire * * * to encourage * * * membership in any labor organization" within the meaning of Section 8 (a) (3) of the Act. The Union's conduct was also in violation of Section 8 (b) (1) (A) of the Act, for in causing employment to be withheld from Fowler because he failed to adhere to the Union's membership rule concerning the method of obtaining employment, the Union restrained and coerced him in the exercise of his right to refrain from assisting the Union and engaging in its concerted activity. This conduct on the part of the Union, violative of both Section 8 (b) (2) and (1) (A), would be privileged only if it was authorized by the union security provision of its agreement with the Company, which continued to be valid after the Act's amendment by virtue of a savings clause (Section 102).

B. The union security provision of the agreement did not authorize the Union's conduct. The agreement obligated the Company to hire as radio officers only "members of the Union in good standing, when available," but the agreement reserved to the Company the "right of free selection" among radio officers who are in good standing, and any radio officer in this class selected by the Company was without more to be given "'clearance' for the position" by the Union. Although more often than not the companies might apply to the Union for the assignment of men, instead of hiring Union members in the open market, this hiring practice was not sufficient to supersede the agreement itself. In this case, exercising its "right of free selection," the Company in February and April, 1948, offered employment to Fowler, who was on both occasions a member of the Union in good standing. In withholding clearance for Fowler, despite its contractual obligation to grant it, the Union was acting in a manner unauthorized by the agreement. Its conduct was, therefore, not privileged.

C. The Union asserts that, apart from the union security agreement, the discrimination it practiced was privileged because its purpose was to enforce an equitable membership rule. But a union's authority to discriminate derives from its union security agreement and not from the equity of its membership rules. It is only through the valid enforcement of such an agree-

ment that a union may achieve the objectives of its membership rules even under the Wagner Act.

The Union further asserts that under the amended Act, so long as an employee remains a member of a union, he submits to having his employment controlled by the union in accordance with its membership rules, and the alternative the amended Act confers is that the employee may withdraw from the union. However, for the period that the union security agreement remained in effect, obligating the Company to hire only union members, an employee could not resign from the union and still work for the Company. Even if he could, this is not the alternative that the Act vouchsafes. For while the amended Act permits a union to adopt and pursue any membership policy it desires, the essence of the statutory scheme is that the union is forbidden to exercise any control over employment for the purpose of enforcing any aspects of its membership policy other than to compel dues payment through a valid union security agreement. Dues payment aside, union membership and the right to a job are divorced.

II

The Union asserts that its refusal to clear Fowler for employment constituted merely a statement of views concerning a breach of its rules and was therefore protected by Section 8 (c) as

an expression of "views, argument, or opinion." But Section 8 (c) safeguards only "noncoercive speech * * * in furtherance of a lawful object;" it does not protect the "bare instigation" of a wrong. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, 704.

III

A. The Board may find that a union caused an employer to discriminate in violation of Section 8 (b) (2) of the Act, even though, because the employer is not a party to the proceeding, the Board cannot find that the employer discriminated in violation of Section 8 (a) (3). A finding against the employer is not a prerequisite to a finding against the Union.

B. The Board did not abuse its discretion in adjudicating that the Union violated Section 8 (b) (2) of the Act though the Company was not a party to the proceeding. First, no charge had been filed against the Company, and by the time the complaint came before the Board for adjudication, the six-month period of limitations for filing a charge against the Company had elapsed. To dismiss the complaint against the Union, therefore, would not have resulted in a proceeding against both the Union and the Company, but would have resulted in a dismissal as to both. No statutory purpose would be effectuated by permitting the discrimination thus to go entirely un-

remedied. Second, the Union presumes that when the General Counsel of the Board received the charge against the Union, he had no good reason for not suggesting or insisting that a similar timely charge be filed against the Company. But there are a multitude of factors, apart from the bare legal merits of a charge, which go to determining whether a prosecution should be initiated. The Union does not begin to suggest an abuse by the General Counsel in exercising his judgment, even assuming that such a judgment is open to review. Third, it is hornbook law that where several tortfeasors are equally liable for the full loss, one or more may be selected for suit. There is no reason for assuming that the Board has less latitude in its choice of procedures.

C. Section 10 (c) of the Act, in authorizing the Board to order appropriate "affirmative action," empowers the Board to enter a back-pay order without a companion reinstatement direction. This was settled before the 1947 amendments to the Act. The amended Act did not withdraw this previously conferred authority. It merely added illustrative language to indicate an extension of that power to include the entry of appropriate back-pay orders against unions as well as employers. There is, accordingly, no basis for the contention that the Board could not enter a back-pay order against the Union in the absence of an order against the Company, which was not a party to the proceeding and could not be directly

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affected by the Board's decision, requiring reinstatement of the employee against whom the Union had caused unlawful discrimination. In any event, this question was not raised before the Board or in the court below, and is therefore not properly before this Court.

ARGUMENT

I. The conduct of the Union in causing the Company to deny employment to Fowler, a member of the Union in good standing, because of Fowler's failure to adhere to the Union's membership rules concerning the method of obtaining employment, was not sanctioned by the union security agreement and therefore violated Section 8 (b) (2) and (1) (A) of the amended Act

Section 8 (a) (3) of the amended Act, like Section 8 (3) of the original Act, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." The proviso to Section 8 (a) (3) of the amended Act limits the permissible grounds of "discrimination against an employee for nonmembership in a labor organization" pursuant to a valid union security agreement to "the failure of the employee to tender the periodic dues and the initiation fees"; on the other hand, the proviso to Section 8 (3) of the original Act provided without limitation that:

> * * * nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not

> established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees * * *.

And unlike the original Act, which provided no means of proceeding against a labor organization for restraint, coercion, and discrimination against employees (*Colgate-Palmolive-Peet Co.* v. *National Labor Relations Board,* 338 U. S. 355, 363–364), Section 8 (b) (2) of the amended Act makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)," while Section 8 (b) (1) (A) further forbids a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7 * * *." Section 7 confers on the employee the right to "refrain" from union activity except as limited by a valid union security agreement.

This case arose under and is governed by the provisions of the amended Act except with respect to the proviso controlling the making and enforcement of union security agreements. Because the agreement in this case was executed between the enactment and the effective date of the amendments and ran for one year, Section 102 of the amended Act makes the proviso to

Section 8 (3) of the original Act applicable.[7] The original proviso, therefore, governs the enforceability of the union security provision of the agreement.

The union security provision of the agreement obligated the Company to hire as radio officers only "members of the Union in good standing, when available" (*supra*, p. 4). Because of employee Fowler's failure to adhere to the Union's unwritten membership rules concerning the method of obtaining employment, the Union caused the Company to deny employment to Fowler in February and April 1948, despite Fowler's retention of membership in good standing at all material times (*supra*, pp. 7–10). The Union seeks to justify the discrimination in hire which it caused by contending (1) that the discrimination did not "encourage or discourage membership in any labor organization" within the meaning of Section 8 (a) (3) of the amended Act, (2) that the discrimination caused was in accord-

[7] In this respect Section 102 provides: "* * * the provisions of section 8 (a) (3) and section 8 (b) (2) * * * as amended * * * shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title * * *."

ance with its agreement and sanctioned by the original proviso, and (3) that even if the discrimination was not privileged under the terms of the agreement and proviso, the enforcement of "equitable" membership rules by denial of employment is not an unfair labor practice. We believe that these contentions are without merit.

A. A system of hiring which requires recourse only to a union for assignment to employment and restricts assignment to union members in good standing encourages membership in a labor organization.

The Union asserts that membership in it was not encouraged by its refusal to clear Fowler for employment when he obtained positions by direct application to the Company and by the Union's insistence that Fowler apply only to it for assignment to employment (Br., pp. 29–33). The Union overlooks that this system of hiring—recourse only to a union for assignment to employment and restriction of assignment to union members in good standing—is the ultimate in a closed shop arrangement. Such an arrangement cannot survive the prohibition against encouragement of membership in a labor organization by discrimination; without more, this prohibition does "of course outlaw any closed shop, for the very essence of the closed shop is that the employer discriminates in employment to require membership in a particular union." Mr. Justice Jackson, dissenting in *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 266. As explained in the Senate Report accompanying an early ver-

sion of the bill which became the Wagner Act (S. Rep. No. 1184, 73d Cong., 2d Sess., 6; see also 79 Cong. Rec. 7673–74):

> If this proviso [authorizing closed shop agreements] were not in the bill, a willing employer and willing employees could not of their own accord agree that thereafter a person seeking employment should be required, as a condition of employment, to join the employees' organization.
>
> The reason is that an employer is elsewhere in the bill * * * forbidden to indulge in "discrimination in regard to hire * * * to encourage * * * membership in any labor organization."

But for the proviso, unions "could not have bargained for and obtained an agreement for a closed or union shop." *National Labor Relations Board* v. *American Car & Foundry Co.*, 161 F. 2d 501, 503 (C. A. 7).

The inescapable effect of the system of hiring the Union sought to impose is to encourage union membership.[8] *Red Star Express* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C. A. 2). Non-members seeking employment have no alternative but to join the Union as a

[8] In its brief (pp. 30–31), the Union objects to inferring the encouraging tendency of the discrimination from the character of the hiring practice without other evidence to prove the tendency. There is no merit to this contention for the reasons we have stated at pages 37 to 43 of our brief in *National Labor Relations Board* v. *International Brotherhood of Teamsters*, No. 301, this Term (hereafter called *Teamsters*).

prerequisite to obtaining a job; existing members are similarly constrained to retain their membership in order to preserve their opportunity for employment; and, in order to remain eligible for assignment to jobs, members are required to maintain their membership in good standing[9] by complying with the Union's membership rules.

Even if the discrimination against Fowler were to be considered in isolation from the overall system of hiring which the Union sought to effectuate, it would be enough to sustain the finding by the Board and the court below that the Act had been violated. Fowler was penalized by denial of employment with the Company for his breach of the membership rules governing the method of hiring. The necessary tendency of this conduct was to encourage his maintenance of membership in good standing by inducing his adherence to the membership rules which state the requirements for good standing.

The Union's conduct not only encouraged Fowler to maintain his membership in good standing, but, as the court below observed (R. II. 84–85), the "result was to encourage membership in the

[9] In its brief (p. 32), the Union contends that membership does not embrace good standing status. Our answer to this contention is stated at pages 28 to 36 of our brief in *Teamsters*. In this case the Union is in a singularly inappropriate position to urge that membership is restricted to enrollment, for its own agreement is phrased in terms of membership in good standing. Unless membership embraces good standing, the proviso (which is worded in terms of membership only, and without which the agreement would necessarily be invalid) does not sanction the agreement.

union" generally, for "Such conduct displayed to all nonmembers the union's power and the strong measures it was prepared to take to protect union members."

In 1947, when Congress amended the Act, it had no doubt that, but for the proviso, the system of hiring enforced by the Union in this case would be prohibited as encouraging membership by discrimination. To eliminate this system of hiring, Congress left intact the introductory language of Section 8 (3) prohibiting discrimination in employment to encourage or discourage membership, but it curtailed the scope of the proviso by outlawing the "closed shop," permitting only a form of "union shop," and limiting the enforcement of permissible union shop agreements to compelling the payment of union dues. The result, as Senator Taft explained, was that (93 Cong. 3836):[10]

> * * * the bill does abolish the closed shop. Perhaps that is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them. That has produced a situation, certainly on the ships going to Alaska, * * * where there is no discipline. A man may be discharged one day and may be hired the next day, either for the same ship or for another ship. Such

[10] See also, *National Maritime Union*, 78 NLRB 971, 973–980, enforced, 175 F. 2d 686 (C. A. 2), certiorari denied, 338 U. S. 954.

> an arrangement gives the union tremendous power over the employees; furthermore it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field. Under such circumstances there is no freedom of exchange in the labor market, but all labor opportunities are frozen.

The Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 6):

> It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea.

If the Union is right that its system of hiring does not encourage membership, then the practices denounced by Senator Taft and the Senate Report nevertheless survive, for Congress thought it was reaching these practices through the prohibitory Wagner Act language, namely, by for-

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bidding "discrimination in regard to * * * employment * * * to encourage or discourage membership in any labor organization * * *." It is clear that the Union's contention must fail and that it can only prevail if it can show that the conduct condemned in this case was permissible under its agreement with the Company to which the proviso in Section 8 (3) of the original Act applies. We turn, therefore, to the agreement.

B. The conduct of the Union in causing the Company to deny Fowler employment was not sanctioned by the union security provision of the agreement.

The Board found (R. I. 23–25, 62–64), and the court below agreed (R. II. 80–83), that the union security provision of the agreement obligated the Company to hire as radio officers only "members of the Union in good standing, when available," but that the agreement reserved to the Company the "right of free selection" among radio officers who are in good standing, and that any radio officer in this class selected by the Company was without more to be given "'clearance' for the position" by the Union. Exercising its "right of free selection," the Company in February and April, 1948, offered employment to Fowler, who was on both occasions a member of the Union in good standing. Although the Union was under a contractual obligation to grant Fowler "clearance" for the proffered position, the Union withheld "clearance" from him, claiming that Fowler

had breached the membership rules which required him to apply directly to the Union, and not to the employer, in seeking employment. As a result of the Union's denial of "clearance," the Company declined to employ Fowler. In thus causing the Company to discriminate against Fowler in regard to his hire for a reason unauthorized by the agreement, the Union violated Section 8 (b) (2) of the amended Act.

The Union contends, however, that the agreement required the Company to apply only to the Union for the assignment of a radio officer when the Company desired to fill a vacancy; and that in dealing directly with each other, the Company and Fowler failed to adhere to the method of hiring prescribed by the agreement, justifying the Union in refusing to clear Fowler for employment (Br., pp. 40–44). Neither the terms of the agreement, nor the practice which the Union asserts controls its meaning, support the interpretation advanced by the Union.

By Section 1 of the agreement, "The Company agrees when vacancies occur * * * *to select* * * * members of the Union in good standing, when available * * *" (R. I. 215, emphasis supplied). Section 6 of the agreement makes clear that in agreeing "to select" union members, the Company has not limited itself to a selection from among the radio officers initially referred to it by the Union, but that it has reserved the right "to select" among union members

in the open market. Section 6 provides that (R. I. 215):

> The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing the Union will so notify the Company in writing.

After first reserving to the Company "the right of free selection," the remainder of Section 6 is devoted to spelling out a procedure which assures that the radio officer selected in the open market will be qualified as a Union member in good standing. To this end, "when members of the Union are * * * hired," the Company obligates itself "to assure that such members are in good standing," and the Union in turn obligates itself "to grant all members of the Union in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned." As the Board observed (R. I. 24):

> Logic impels the conclusion that these two obligatory provisions are complementary; the Company is charged with responsibility to ascertain the good standing of any radio officers it might hire, and the [Union], best

> informed as to their union standing, is obligated to certify their status and thereby to assure the Company that it has carried out its contractual obligation. That this is the correct import of the clearance provision of the contract * * * is definitely established by the last clause in the same section 6: it reads, "If an employee is not a member in good standing, the Union will so notify the Company in writing." If * * * the Company were only permitted to hire employees referred by the union, there could be no occasion for the union to advise the Company that any particular employee, referred from the union hall, was not in good standing. This last sentence of section 6 could only refer, then, to the situation where the Company directly hires an employee whom it believes to be in good standing, but who, in the opinion of the union, is not.

The court below agreed (R. II. 82): "These provisions plainly give the company the right to select the man it desires to hire, and require the union to grant 'clearance' if the man the company wants is a member in good standing."

The Union claims that the word "clearance" used in section 6 of the contract is ambiguous (Br., p. 41). But it fails to advance a single reason to detract from the analysis made by the Board and the court of the function of the word in the context of the section as a whole. And the interpretation of the agreement which the Union would substitute—that the Company is restricted

to hiring radio officers initially referred to it by the Union—cannot be adopted without nullifying the words reserving to the Company "the right of free selection." Furthermore, when parties desire to establish the arrangement urged by the Union, they have no difficulty devising a form of words expressing that intention without ambiguity (R. I. 25, n. 6, collecting illustrative agreements requiring hiring through a union). In short, except for the meaning given the agreement by the Board and the court, it "admits of no interpretation which does not distort it beyond what the words will bear." Judge Learned Hand, in *Eustis Mining Co.* v. *Beer, Sondheimer & Co., Inc.,* 239 Fed. 976, 986 (S. D. N. Y.); see also, 3 Williston, *Contracts,* § 623, pp. 1793–94, (rev. ed. 1936); *South Atlantic Steamship Co.* v. *National Labor Relations Board,* 116 F. 2d 480, 482 (C. A. 5), certiorari denied, 313 U. S. 582; *In re Chicago & E. I. Ry. Co.,* 94 F. 2d 296, 299 (C. A. 7).

In essence, therefore, the Union is reduced to the claim that the agreement has been superseded by a purported actual hiring practice so compelling in character that the practice, rather than the agreement, is the controlling contract. But the practice, which the Union was given a full opportunity to prove (R. I. 150–153, 163–165,

167–168, 174–179, 193–194, R. II. 34–35),[11] establishes only that more often than not the companies, rather than hire in the open market, would apply to the Union for the assignment of radio officers when there was a vacancy to fill. The testimony of the Union's representative itself shows that the practice of hiring through the Union was by no means uniform (R. I. 167–168):

> The WITNESS. * * * There have been cases where a company has asked for a certain individual. That is not very frequent, however. In fact, it is very, very infrequent. They do not call up and say, "We want Mr. Joe Beef," or "We want Mr. Fowler." They call up and say, "Send me down a radio officer."
>
> Trial Examiner SCHARNIKOW. What happens in the case where they ask for a specific man?
>
> The WITNESS. We will ask them why they prefer this man or we will endeavor to get hold of the man, if we can, if he is available, we try to get him for the company. But we do like to know the reason why they want a certain individual.

[11] In its brief (p. 41), the Union contends that it was unduly restricted in its proof as to the practice. But the court below held that it "can find in the record no exclusion of proffered evidence which would add anything material" to what the Union sought to and did establish (R. I. 83). The Union points to the examiner's rulings sustaining objections to certain questions (R. II. 44–46), but the Union did not at that stage offer to show, and it does not even now state, what evidence it sought to adduce by the rejected line of inquiry.

> Trial Examiner SCHARNIKOW. Do you clear a man in that case at the instance of the company in spite of the fact that he is not at the top of the list?
>
> The WITNESS. *We have cleared many hundreds of them.* I can say at this time some of our members don't think too much of that system. [Emphasis supplied.]

A practice to which there are admittedly "many hundreds" of exceptions hardly has the cogency to supersede the actual writing which the employers and the Union have adopted as the solemn expression of their agreement.[12] The court below therefore properly concluded (R. II. 83):

> We agree with the Board that such practice did not effect a surrender of the company's

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[12] Compare Judge Learned Hand in *Eustis Mining Co.* v. *Beer, Sondheimer & Co.*, 239 Fed. 976, 985 (S. D. N. Y.): "The admissibility of the general surroundings in which the contract was written (Merriam v. U. S., 107 U. S. 437, 441 * * *), rests upon * * * the ambiguity of the written words. All the attendant facts constituting the setting of a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might 'contradict' the contract—that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet, as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include."

> rights under the contract. In most instances the company may have found it more convenient to ask the union to send a man than to find one for itself, but a party to a contract does not lose clearly reserved rights merely by noninsistence upon them in every instance.

An interpretation of a union security agreement which hews closely to the meaning expressed by the language, and which treats with caution any practice urged in substitution for the language, is in keeping with the character of the proviso which permits such agreements. For in "view of the stringent requirements of closed-shop provisions, it is not too much to require that the parties thereto express the essentials of such provisions in unmistakable language." *Iron Fireman Mfg. Co.,* 69 NLRB 19, 20. In addition, the "proviso in Section 8 (3) follows a prohibition of employer discrimination, and one seeking to come within the exception must clearly comply with its terms." *National Labor Relations Board* v. *Don Juan, Inc.,* 178 F. 2d 625, 627 (C. A. 2).[13]

We submit, in short, that the Board and the court below were clearly correct in rejecting the

[13] To support its view (Br., pp. 43–44), the Union cites *National Labor Relations Board* v. *Scientific Nutrition Corp.*, 180 F. 2d 447 (C. A. 9), but that case is not contrary to the decision below. In that case an equivocal union security provision was construed in the light of an unambiguous practice to establish a closed shop. In this case the Union would substitute an equivocal practice for unambiguous language.

Union's claim that its agreement with the Company authorized the discrimination in this case. It bears mention, moreover, that the concurrent determination of the Board and the court below of the meaning of the language of the agreement, and the influence that a practice is to have on its interpretation, should be conclusive at least in the absence of an exceptional showing of error. See *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 75; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 357. This sort of question is "in the keeping of the Courts of Appeals." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491; see also *National Labor Relations Board* v. *American National Ins. Co.,* 343 U. S. 395, 409–410.

C. Neither the merits of the Union's membership rule, nor the purported alternatives that the member may either withdraw from the Union or respect the rule, can justify discrimination in employment when it is unauthorized by a union security agreement.

Since the conduct of the Union in causing the Company to deny Fowler employment encouraged membership in the Union (*supra,* pp. 21–26), and since the discrimination practiced was unauthorized by the union security agreement (*supra,* pp. 26–34), there is no question that the Union violated Section 8 (b) (2) of the Act, for it caused the "employer to discriminate against an employee in violation of subsection [8] (a) (3) * * *"

By the same conduct the Union also violated Section 8 (b) (1) (A). That section safeguards employees against restraint and coercion by a labor organization "in the exercise of the rights guaranteed in section 7." Section 7 confers on employees the right to "assist labor organizations" and to engage in other "concerted activities" for other "mutual aid or protection;" but it also confers on employees the converse right "to refrain from any or all of such activities" except as limited by a valid union security agreement. The Union's conduct in fostering a system of hiring which would require employers to apply only to it for the assignment of union members clearly constituted concerted activity for mutual aid or protection (R. I. 59–60). But, equally clearly, Fowler's refusal to cooperate with the Union in its program constituted an exercise of the right to "refrain" from "assisting" the Union or engaging in its "concerted activity." That abstention is protected from restraint and coercion. As the court below held (R. II. 84), when because of this abstention the Union refused to clear Fowler for employment with the Company, in a manner unauthorized by the union security agreement, the Union was exerting "economic coercion in its most effective form." It was against such deprivation of the opportunity

to work that Section 8 (b) (1) (A) was directed.[14]

The Union contends, however, that even apart from the union security agreement, the denial of employment to Fowler was justified because its purpose was to enforce an "equitable" membership rule and not one "of the 'indefensible' variety" (Br., pp. 33–34). It asserts that in requiring members to seek employment only through the Union, and not by direct application to the employer, the Union's purpose is to assure (1) that the member longest unemployed will be the first hired, and (2) that a member on a job who is doing his work satisfactorily will not be displaced ("bumped") by another member. The

[14] Thus, Senator Taft summarized the mandate the section addresses to unions as follows: "You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn * * * You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, *prevent them from exercising their right to work.*" 93 Cong. Rec. 4436, [emphasis supplied]; see also 93 Cong. Rec. 4435–4436, 4021, 4023.

The Union concedes (Br., p. 28) that it may have "interfered" with Fowler's employment but argues that "interference" was specifically omitted as a form of violation from Section 8 (b) (1) (A). "Interference" was deleted from 8 (b) (1) (A) because it was deemed vague and because it might be construed to apply to legitimate union activity. 93 Cong. Rec. 4021–4023. This deletion was not intended to permit union instigation of job discrimination, which was, indeed, one of the major evils at which the section was aimed. See 93 Cong. Rec. 4435–4436, 4021–4023.

Union states further that "In the instant case, the denial of clearance [to Fowler] was motivated by the twofold purpose of (1) enforcing these rules of fair dealing and, (2) in the February incident, of protesting the wrongful discharge of Kozel, the incumbent union member, whose services had been satisfactory to the Company, and who desired to retain his post" (Br., p. 34).[15] But

[15] There is a suggestion in the Union's brief (pp. 11, n. 4, 29, n. 7) that with respect to Kozel, the Union was acting not only to enforce its membership rule, but also to vindicate Kozel's alleged contractual right not to be discharged if his work was satisfactory. The assertion that the Union's conduct was prompted by this added motive has little factual support. The contractual provision referred to seems to safeguard the Company against a Union demand for the discharge of a satisfactory employee; it does not appear to safeguard the satisfactory employee from discharge by the Company (R. II. 72). In addition, the contract seems to require that any disputes of this character shall be handled through the grievance procedure of the contract (R. II. 72–73), which was not done here. Moreover, even during the February denial of employment to Fowler, the Union denied clearance to Fowler after Kozel had left the ship. Despite Kozel's relinquishment of interest in retaining the job, the Union denied the Company's later request to clear Fowler. The Union dispatched a third radio officer, Miller, for employment with the Company, despite Fowler's availability, and at a time when Kozel's interest in the job could no longer be a factor. (R. I. 53, 50–53; 125, 135–137, 144, R. II. 64–65).

There seems to be, therefore, no reasonable likelihood that Kozel's alleged contractual right was the reason for the Union's conduct. But if it were, it is at best only part of the reason, and it is settled law that where lawful and unlawful purposes are intermingled, the conduct is wrongful; hence the court below properly concluded that Kozel's alleged contractual right "is immaterial" (R. II. 85). *E. g.*, *National Labor Relations Board* v. *Stilley Plywood Co., Inc.*, 199 F.

these contentions are immaterial. For neither the Union's agreement with the Company, to which the original Act applies, nor the provision of the amended Act leaving unions free to regulate their internal affairs as they see fit, can justify the discrimination in this case.

1. The Union's authority to control employment derived only from the agreement with the Company; the Union's rules, however "equitable", could not expand this authority.

The Union's argument overlooks that under the Wagner Act, which admittedly governs the agreement between the Union and the Company in this case, Congress provided a specific method by which a union might achieve the objectives of its membership rules. That method was the union security agreement. The essence of the method was that by an agreement a union was vested with the power to cause impairment of a worker's employment if the worker failed to acquire or retain

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2d 319, 320 (C. A. 4) ("contributory factors"); *Universal Camera Corp.* v. *National Labor Relations Board*, 179 F. 2d 749, 754 (C. A. 2), reversed on other grounds, 340 U. S. 474 ("one of the causes"); *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C. A. 7), certiorari denied, 320 U. S. 789 ("at least a contributing motive"); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. 2d 340, 349 (C. A. 8) ("at least one purpose"); *Cupples Co. Mfrs.* v. *National Labor Relations Board*, 106 F. 2d 100, 117 (C. A. 8) ("at least a contributing cause"); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2), certiorari denied, 304 U. S. 576 ("at least one cause").

In any event, the April denial of employment to Fowler cannot be explained on the basis of vindicating a contractual right rather than enforcing a membership rule.

union membership in good standing in accordance with the standards prescribed by the union. See Board's brief in *Teamsters,* pp. 17–18, 30–33. Thus, in this case, on the basis of Fowler's breach of the unwritten membership rule concerning the method of hire, the Union could have divested Fowler of his status as a member in good standing, and thereupon it could have denied him employment in accordance with the agreement. Failing that, it was unauthorized to impair his employment, whether or not the membership rule was equitable or inequitable.

For example, a membership rule prohibiting dual union activity was certainly equitable from the union's standpoint. *Colgate-Palmolive-Peet Co.* v. *National Labor Relations Board,* 338 U. S. 355. Yet a member's default in the performance of this obligation of membership, if the default was not translated by the union into loss of membership in good standing, did not justify any discrimination in the member's employment, even if a valid union security agreement existed. *Ansley Radio Corp.,* 18 NLRB 1028, 1042–1043; *National Labor Relations Board* v. *Federal Engineering Co.,* 153 F. 2d 233, 235 (C. A. 6), enforcing 60 NLRB 592, 593. Conversely, if a member was divested of his good standing, a union-security agreement could validly be invoked to impair his employment, and it did not matter how inequitable the underlying membership rule was. (See Board's brief in *Teamsters,* pp. 19–20, collecting

instances of enforcement of union security agreements which were abusive in the view of Congress.) In short, a union's authority to control employment on the basis of its membership rules lay in its union security agreement and not in the equity of its rules.[16] As this Court has explained, the "provision for a closed shop, as permitted by § 8 (3), follows grammatically a prohibition of discrimination in hiring. These words of the exception" were "carefully chosen to express the precise nature and limits of permissible" discrimination. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 694–695. The permissible discrimination was defined and confined by the union security agreement. In this case the discrimination practiced exceeded the sanction of the agreement. The Union could not substitute its unwritten membership rules for the agreement, however worthy its motive.[17] Any other result would have permitted

[16] It bears emphasis that this case involves Section 8 (3) of the original Act, not Section 8 (a) (3) of the amended Act. Under the latter, which permits discrimination against an employee pursuant to a union security agreement only for failure to pay dues or initiation fees, such agreements no longer afford a lawful means of enforcing union rules regarding matters other than dues or fees.

[17] It has long been settled that where prohibited conduct is engaged in, the offender is justified neither by "good faith" (*McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C. A. 7)), nor the absence of evil "animus or desire" (*National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853 (C. A. 8)), nor the "serious dilemma" of his position (*National Labor Relations*

the Union to enlarge the agreement it was able to negotiate—a contract reserving to the Company the right of free selection among radio officers in good standing—to an agreement it failed to negotiate—a contract restricting employment to union members initially referred to the Company by the Union.

2. The amended Act, while leaving unions free to determine their internal policies, does not authorize the discrimination effected in this case.

The Union contends in effect that as long as an employee remains a member of a union, he submits to having his employment controlled by the union in accordance with its membership rules, and impairment of his employment to enforce these rules is not the kind of discrimination, restraint and coercion against which either the original or the amended Act aims (Br., pp. 35–39, 31–33). It urges that "Fowler was free to resign from the Union or to have nothing to do with the Union's hiring hall, but he was" not "free to remain a member of the Union and utilize the facilities of the Union's hiring hall upon his own terms * * *" (Br., p. 39).

Board v. *Star Publishing Co.*, 97 F. 2d 465, 471 (C. A. 9)), nor "good business reasons" (*Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 440 (C. A. 7), for a statutory infraction is not condoned by the worthiness of the "motive". *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532–533 (C. A. 6); *National Labor Relations Board* v. *Perfect Circle Co.*, 162 F. 2d 566, 573 (C. A. 7).

And it appears to rely (Br., p. 32) on the proviso to Section 8 (b) (1) (A) of the amended Act which states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."

It may be noted at the outset that the Union's argument involves the incorrect assumption that Fowler had the realistic alternative of resigning from the Union. So long as the union security agreement remained in effect (validated for a year by Section 102 of the amended Act, *supra,* pp. 4, n. 3, 19–20, n. 7), it obligated the Company to hire only members of the Union in good standing, and Fowler could not resign from the Union and still work for the Company or any other carrier covered by a similar agreement. But even if Fowler could resign from the Union and continue to work without hindrance from it, the amended Act is not premised on the view that the choice vouchsafed the employee is to resign from the Union, and be free of discrimination and restraint by it, or to stay in the Union, and submit to its discriminatory control over employment. For that view presupposes that as against labor organizations Congress safeguarded only the job rights of non-union employees and that it was indifferent to the job rights of union members. But in curtailing the scope of the union security agreement in the amended Act, Congress was clearly concerned with what it con-

ceived to be the abuses against *union members* which were perpetrated through these agreements. See Board's brief in *Teamsters,* pp. 19–20. And while the amended Act permits a union to adopt and pursue any membership policy it deems wise, to exert any internal union discipline it desires, and to deny or terminate membership on any ground it chooses, the essence of the statutory scheme is that the union is forbidden to exercise control over employment for the purpose of enforcing any aspect of its membership policy other than to compel dues payment through a union security agreement. *Id.,* pp. 22–25. The proviso to Section 8 (b) (1) (A) safeguards the union's right to promulgate its membership policy; but the remainder of the statutory scheme safeguards the employee from compulsory adherence to it through control over his employment. *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815. In short, except for dues payment through a valid union security agreement, union membership and the right to a job are divorced.

Therefore, the true alternatives which the amended Act confers on an employee are to join a union, to be a good, bad, or indifferent union member, or to withdraw from a union; and to be uninfluenced in any of these choices by concern that his employment will be affected by his decision. And in dealing with a dissident union mem-

ber, the true alternatives which a union has are to tolerate, suspend or expel him, or apply internal union sanctions against him, but not to exert any employment pressure on him based on default in the performance of his membership obligations. For with the exception of compelling dues payment through a valid union security agreement, a labor organization is divested of all control over employment for the purpose of either advancing or retarding an employee's exercise of the right to participate in or to forego union activity. See Board's brief in *Teamsters,* pp. 13–26.

II. The Union's discriminatory refusal to grant Fowler clearance for any employment with the Company does not constitute expression of "views, argument, or opinion" protected by Section 8 (c) of the Act

The Union contends (Br. pp. 26–29) that its refusal to grant Fowler clearance for employment with the Company constituted merely an expression of views concerning a breach of its rules, not accompanied by any "threat of reprisal or force or promise of benefit," and was therefore protected by Section 8 (c) of the Act as an expression of "views, argument, or opinion."

Verbal inducement of unlawful conduct is not safeguarded by Section 8 (c) of the Act. "The remedial function of Section 8 (c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object;" it does not protect "bare instigation" to unlawful conduct. *International Brotherhood of Electrical*

Workers v. *National Labor Relations Board*, 341 U. S. 694, 704.[18] As explained in *National Labor Relations Board* v. *Jarka Corp.*, 198 F. 2d 618, 621 (C. A. 3):

> * * * we think an understandable and reasonable distinction can and should be drawn between such expressions of views as are protected generally by Section 8 (c) and that exhortation of another to action which is intended to cause or does cause unlawful discrimination in hiring, a wrong prohibited by Section 8 (b) (2).[19]

No immunity, statutory or constitutional, extends to "speech or writing used as an integral part of conduct in violation of a valid * * * statute." *Giboney* v. *Empire Storage and Ice Co.*, 336 U. S. 490, 498.

Accordingly, the statements expressing the Union's refusal to clear Fowler for employment because of his breach of membership rules are not protected by Section 8 (c). They amount to no more than verbal inducement to discrimination, the "bare instigation" of a wrong.

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[18] For a full statement of the scope of Section 8 (c), see pages 36–39, 44–55 of the Board's brief in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, October Term, 1950, No. 108.

[19] In the Second Circuit's decision in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 38, affirmed, 341 U. S. 694, 704, in an opinion by Judge Learned Hand, the identical view was expressed concerning the relationship of Section 8 (c) to Section 8 (b) (2).

III. The Board properly proceeded to its finding that the Union had violated Section 8 (b) (2), despite the fact that the employer was not a party, and correctly entered a back-pay order against the Union though no reinstatement order could be entered against the employer

The Union contends (1) that the Board has no power to find that the Union, in violation of Section 8 (b) (2), caused the Company to discriminate against Fowler, unless the Company is a party to the proceeding and is concomitantly found to have violated Section 8 (a) (3); and (2) that, in any event, the Board has no power to assess back pay against the Union, because back pay cannot be awarded without a companion reinstatement order running against the employer. (Br., pp. 19–26.) We shall show that each of these contentions is without merit.

A. The Board is empowered to find that the Union has caused the employer to discriminate despite the fact that the Board cannot, because the employer is not a party to the proceeding, make a similar finding against the employer.

There is no statutory support for the Union's contention that, unless the employer is a party to the proceeding and is found to have discriminated in violation of Section 8 (a) (3), the Board has no power to find that the union has caused discrimination in violation of Section 8 (b) (2). Section 10 (a) of the Act, defining the power of the Board, provides in relevant part that:

> The Board is empowered, as hereinafter provided, to prevent *any person* from engaging

> in any unfair labor practice (listed in section 8) affecting commerce. [Emphasis supplied.]

The only relevant limitation upon the exercise of this power is that until "it is charged that any person" has engaged in an unfair labor practice, the Board may not proceed against "such person." (Section 10 (b) of the Act.) In this case, the Union was charged with engaging in unfair labor practices (R. I. 8–10), and therefore the only relevant pre-condition to the Board's proceeding against it was satisfied.

The Union purports to find an implied limitation on the Board's power in the language of Section 8 (b) (2) itself. This provision declares that it shall be an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee *in violation of subsection* [8] (*a*) (*3*) * * *" (Emphasis supplied). The argument runs that, since the Company is not a party to the proceeding, it cannot be found to have violated Section 8 (a) (3), and therefore the Union cannot be held to have caused discrimination "in violation of subsection [8] (a) (3)." The fallacy in this argument is the assumption that a finding against the employer is a prerequisite to a finding against the union.

There is no basis for the assumption. *George C. Quinley,* 92 NLRB 877, cited with approval in *National Labor Relations Board* v. *Newspaper and Mail Deliverers' Union,* 192 F. 2d 654, 656

(C. A. 2). In *Quinley,* the Board explained that the language reading "in violation of subsection (a) (3)," appearing in Section 8 (b) (2), "was intended by Congress to be *descriptive* of the kind of discharge it is unlawful for a union to cause or attempt to cause. We note that an *attempt* by a labor organization to cause a discriminatory discharge is a violation of Section 8 (b) (2), even though it would never be possible to find a violation of Section 8 (a) (3) by the employer where he resisted the attempt and refused to discriminate. Necessarily, therefore, the statutory words 'in violation of subsection (a) (3)' are merely descriptive with reference to an attempt. These same quoted words do not take on a new and different meaning when the attempt succeeds—they again merely describe the kind of discharge it is unlawful for the union to demand" (92 NLRB at 878). Accordingly, "whether or not the employer is a party to a proceeding," in "order to establish a violation of Section 8 (b) (2)," it is only necessary to "prove that the labor organization 'caused' the employer to engage in conduct which—if the employer were before the Board—would be found to violate Section 8 (a) (3)." *Newspaper and Mail Deliveries' Union,* 93 NLRB 419, 420, enforced, 192 F. 2d 654, 656 (C. A. 2). Accord: *Katz, d/b/a Lee's Department Store* v. *National Labor Relations Board,* 196 F. 2d 411, 416 (C. A. 9), where in the converse situation, it was held that the Board was not pre-

cluded from finding an employer alone guilty of violating Section 8 (a) (3) where the union which caused the discrimination was not charged and hence not joined as a respondent.

B. The Board did not abuse its discretion in adjudicating that the Union had violated Section 8 (b) (2) though the Company was not a party.

The Union contends further that, whatever may be the Board's power to act, it abused its discretion in not dismissing the complaint, urging that to proceed against the Union without also proceeding against the Company fails to advance the policies of the Act. Its major premise is that where both a union and an employer are responsible for discrimination, and both are parties to the proceeding, the Board assesses each of them with joint and several liability for any loss of pay resulting from the discrimination, and it does not apportion their liability on the basis of relative culpability.[20] (Br., pp. 21–22.) From the premise that each is independently responsible for the full loss, even when both are parties to the proceeding, the Union deduces the inconsistent conclusion that the prosecution should not be permitted to proceed against one alone. It asserts that "approval of this practice"—proceeding against one alone—"under the circumstances here involved"

[20] *E. g., Union Starch and Refining Co.* v. *National Labor Relations Board*, 186 F. 2d 1008, 1013–1015 (C. A. 7), certiorari denied, 342 U. S. 815; *Acme Mattress Co., Inc.*, 91 NLRB 1010, 1013–1018, enforced, 192 F. 2d 524, 528 (C. A. 7).

entails the "possible evil consequences" of "collusive injury and of arbitrary favoritism" (Br., p. 23). To support this vague suggestion of "evil consequences" which it views as "readily foreseeable," the Union does not specify a single circumstance in this or any other case suggesting any abuse, nor does it detail any abuses reasonably to be anticipated which would warrant the adoption of a fixed rule requiring joinder of employer and union whenever both are responsible for discrimination.

It is patent that the Union has shown no abuse of discretion; indeed, the actual danger of abuse and defeat of the Act's purposes lies in the adoption of the Union's suggestion, as may readily be demonstrated.

1. No charge was filed against the Company in this case (R. I. 78). Without a charge the General Counsel of the Board had no authority to issue a complaint against the Company.[21] The

[21] Section 10 (b) of the Act; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. 2d 98, 102 (C. A. 2); *cf. National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17. Early versions of the bill which became the Wagner Act permitted the Board to proceed without a charge, but for reasons not now ascertainable, that discretion was withheld from the Board in the Act as finally adopted. S. 2926, 73d Cong., 2d Sess., sec. 205 (b), reprinted in Vol. 1 of the Legislative History of the National Labor Relations Act 1935 (U. S. Gov't Printing Office, 1949), pp. 1, 6; sec. 205 (b) of H. R. 8423, 73d Cong., 2d Sess., reprinted in 1 Leg. Hist. 1128, 1133; sec. 10 (c) of S. 1958, 74th Cong., 1st Sess., reprinted in 1 Leg. Hist. 1295, 1301; sec. 10 (c) of H. R. 6288, 74th Cong., 1st Sess., reprinted in 2 Leg. Hist.

complaint against the Union was issued on March 2, 1950 (R. I. 11, 15), based on unfair labor practices occurring in early 1948. Therefore, by the time the complaint came before the Board for adjudication, the six-month period of limitations prescribed by Section 10 (b) for filing a charge against the Company had long since elapsed. Had the Board dismissed the complaint for "failure to join the employer" (Br., p. 20), as the Union maintains should have been done, it would no longer have been within the power of anyone to file a valid charge against the Company, the period of limitations having run. Hence, the result of dismissing the complaint against the Union would not have been to induce a proceeding against both the Company and the Union; the result would have been to have the discrimination practiced go entirely unremedied.

2. The Union appears to assume that the General Counsel of the Board, when he received the charge against the Union, had no good reason for not suggesting or insisting that a similar timely

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2459, 2464–2465. See also the remarks of Senator Wagner, in Hearings before the Senate Committee on Education and Labor, 73d Cong., 2d Sess., on S. 2926, Part I, p. 11, reprinted 1 Leg. Hist. 26, 41; remarks of Mr. Handler at pages 36–37 of the same Hearings, reprinted *id.* at 66–67; S. Rep. No. 1184, 73d Cong., 2d Sess., reprinted *id.* at 1398, 1403; Hearings before the Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, p. 709, reprinted in 1 Leg. Hist. 1373, 2 *id.* 2095. See also Sen. Doc. No. 8, 77th Cong., 1st Sess., Report of the Attorney General's Committee on Administrative Procedure, p. 288.

charge be filed against the Company. But there are a multitude of factors, apart from the bare legal merits of a charge, which go to determining whether a prosecution should be initiated. For example, it may have been thought that the Company's offense was unwitting, made under the pressure of a closed shop agreement, not indicative of a disposition to dishonor the statutory rights of employees, and therefore not worthwhile prosecuting; it may also have been thought that without the Company's cooperation, which might not have been forthcoming if it were also proceeded against, the requisite proof to establish the Union's unfair labor practices could not be obtained.

These are factors legitimately to be considered in determining whether to prosecute. In conferring on the General Counsel of the Board "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board," Section 3 (d) of the Act entrusts the evaluation of these factors to the General Counsel as the prosecuting arm of the agency. Neither the Board, as the adjudicatory arm of the agency, nor a reviewing court, has access to the information on which he acts. As the Board has explained, "dismissal of the complaint against the * * * Union, * * * solely because no complaint against the Employer was issued by the

General Counsel, would be * * * an intrusion upon his exclusive province." *George C. Quinley,* 92 NLRB 877, 879. The character of the problem makes it plain that "the course to be pursued rests in the sound discretion of the [General Counsel of the] Board and is the concern of expert administrative policy. That discretion is not a legal discretion at least in so far that upon the abuse of it the several circuit courts of appeals might compel the [General Counsel of the] Board to issue a complaint." *Jacobsen* v. *National Labor Relations Board,* 120 F. 2d 96, 100 (C. A. 3); see also, *General Drivers* v. *National Labor Relations Board,* 179 F. 2d 492, 494–495 (C. A. 10), and cases cited at n. 5 thereof.

3. It is hornbook law that one of several tortfeasors may be selected for suit where each is liable for the full loss. *Restatement, Torts,* § 882 (1939).[22] The Union concedes, indeed insists, that had the Company been joined, the Union would nevertheless be jointly and severally responsible for the entire loss resulting from the discrimination (Br., pp. 21–22). In the absence of compelling circumstances, not here suggested, there is no reason to suppose that the Board is confined more narrowly in its choice of procedures than is true in a conventional lawsuit. On

[22] "Where each of two or more persons is liable for the full amount of damages which are allowed for a single harm resulting from their tortious conduct, the injured person can properly maintain a single action against one, some, or all of them."

the contrary, in vindicating the public right, it enjoys a greater latitude. Compare *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 188.

C. The Board is empowered to enter a back-pay order against the Union without a companion reinstatement remedy running against the employer.

The Union contends that, in requiring it to reimburse Fowler for any back pay he lost as a result of the discrimination against him, the Board's order "clearly contravenes Section 10 (c) in that it contains a back pay provision although no reinstatement direction is contained therein" (Br., p. 25). We shall show, first, that the Union is precluded from raising this question because it failed to present it to the Board or the court below, and, second, that the contention is in any event without merit.

1. The issue whether a back-pay order can be entered against the union without a companion reinstatement order running against the employer was not raised before the Board or in the court below.[23] Section 10 (e) of the Act provides that "no objection that has not been urged before the Board * * * shall be considered by the court" in the absence of extraordinary circumstances (*National Labor Relations Board* v.

[23] Copies of the Union's brief below and of its brief to the Board in support of its exceptions to the examiner's intermediate report have been lodged with the Clerk of the Court. The exceptions are contained in the certified record presently before the Court.

Cheney California Lumber Co., 327 U. S. 385; see also, *United States* v. *Tucker Truck Lines*, 344 U. S. 33), and this Court will not ordinarily review a question "not properly raised, litigated or passed upon below" (*McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328).

2. The Union's contention is in any event without merit. The Board recognizes that, where the employer is not a party to the proceeding, the Board cannot direct the employer to offer reinstatement to the employee discriminated against. Instead, as in this case (R. I. 29), the Board directs the union to inform both the employer and the employee that it has no objection to the employee's reinstatement. In addition, it requires the union to make the employee whole, as nearly as possible, for any loss of pay or deprivation of other benefits of the employment relationship sustained as a result of the discrimination. *Pen and Pencil Workers Union*, 91 NLRB 883, 888–890. The Board holds that the "absence of any reinstatement order against the Employer in no way affects our power to issue a back-pay order against the Union." *George C. Quinley*, 92 NLRB 877, 880.

Under Section 10 (c) of the original Act, the Board was empowered to order an offender "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *." It was held early in the Act's history that the

participial phrase "including reinstatement of employees with or without back pay" did not limit, but merely illustrated, the general grant of power to award affirmative relief. *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U. S. 177, 188–189. It was accordingly settled that, even without a reinstatement direction, the Board was empowered to enter a back-pay order.[24]

In 1947, when the Act was expanded to include unfair labor practices by labor organizations, a further illustration was added of the "affirmative action" the Board was empowered to direct. A proviso to the authority to grant affirmative relief was enacted which specifies that:

> where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

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[24] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. 2d 202, 205 (C. A. 2), affirmed, 313 U. S. 177, 200; *Indianapolis P. & L. Co.* v. *National Labor Relations Board*, 122 F. 2d 757, 763 (C. A. 7), certiorari denied, 315 U. S. 804; *National Labor Relations Board* v. *Revlon Products Corp.*, 144 F. 2d 88, 90 (C. A. 2); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238–239 (C. A. 8), certiorari denied, 334 U. S. 845; *Reliance Mfg. Co.* v. *National Labor Relations Board*, 125 F. 2d 311, 321 (C. A. 7); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 114 F. 2d 144, 147–148 (C. A. 7), certiorari denied, 311 U. S. 704; *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. 2d 432, 434, note 2 (C. A. 7); *Link-Belt Co.* v. *National Labor Relations Board*, 110 F. 2d 506, 511, 512 (C. A. 7), affirmed in this respect, 311 U. S. 584.

The Union contends, in effect, that by the words "where an order directs reinstatement of an employee," Congress withdrew the power previously conferred to order back pay without reinstatement. But there is no more justification now than there was before 1947 "for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 189.

The purpose of Congress in enacting the proviso was not to restrict but "'to *extend* the power of the Board so as to provide it with a means to remedy union unfair labor practices newly established by the Labor Management Relations Act, comparable to the means it already had to remedy the employer unfair labor practices established by the National Labor Relations Act.' *H. N. Newman,* 85 NLRB 725, 732 [enforced, 187 F. 2d 488 (C. A. 2)]." *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1015 (C. A. 7), certiorari denied, 342 U. S. 815. It "plainly was intended merely to make an express extension of the power of the Board to order back pay, to include labor organizations, as well as employers, where they engaged in unfair labor practices under the Act." *National Labor Relations Board* v. *J. I. Case Co.,* 198 F. 2d 919, 924 (C. A. 8). In recognition of the non-restrictive character of the proviso, it

has been held that, despite the words "employer *or* labor organization," the Board is empowered to assess each of them with joint and several liability for back pay where both are responsible for discrimination, and that the Board is not confined to a compulsory choice between the two.[25] Similarly, despite the word "discrimination," which arguably confines an order of back pay and reinstatement to the unfair labor practice of discrimination defined in Sections 8 (a) (3) and 8 (b) (2), the Board retains the authority to order back pay and reinstatement for the unfair labor practice of interference, restraint and coercion defined by Section 8 (a) (1) of the Act.[26] And so in this case, despite the words "where an order directs reinstatement," the Board has authority to order back pay without reinstatement. For the words of the proviso are "casual description only, and not an injected limitation," of the Board's authority to order affirmative action effectuating the policy of the Act. *National Labor Relations Board* v. *J. I. Case Co.,* 198 F. 2d 919, 924 (C. A. 8).

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[25] *Union Starch & Refining Co.* v. *National Labor Relations Board*, 186 F. 2d 1008, 1013–1015 (C. A. 7), certiorari denied, 342 U. S. 815; *H. M. Newman*, 85 NLRB 725, 730-733, enforced, 187 F. 2d 488 (C. A. 2); *Acme Mattress Co., Inc.*, 91 NLRB 1010, 1013–18, enforced, 192 F. 2d 524, 528 (C. A. 7); *National Labor Relations Board* v. *Newspaper and Mail Deliverers' Union*, 192 F. 2d 654, 656 (C. A. 2).

[26] *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919, 924 (C. A. 8).

Had it been Congress' purpose to withdraw from the Board the authority to award back pay without reinstatement, an aspect of the Board's remedial power which at the time of the 1947 amendments was settled and judicially approved (*supra,* pp. 55–56), we should expect to find at least a history of dissatisfaction with its use and an expression of a desire to discontinue it. Instead, insofar as the legislative history lends itself to any inference, it discloses a desire to leave the Board's remedial authority unfettered. Thus, a provision in the House bill[27] which would have restricted a Board order to the relief requested in the complaint was not accepted by the conferees.[28] Similarly, a provision in the House bill specifying a particular remedy in non-back-pay cases, and thereby implying a restriction of the Board to that remedy in such cases, was deleted by the conferees, who explained that Congress should not "by implication, limit * * * the Board in its choice of remedial orders * * *."[29] Rejecting such limitations, the conferees adopted the language of the Senate amendment which expressly preserved the broad wording of the original Act authorizing the Board "to take such affirmative action as will effectuate the policies of this Act," and which also contained in the proviso the reference to union liability for back pay, as

[27] H. R. 3020, 80th Cong., 1st Sess., in 1 Leg. Hist. 68, 195.
[28] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 54.
[29] *Ibid.*

it now reads.[30] This history "shows a determination to maintain the full scope of administrative discretion * * * in fitting remedies to violations." *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, 1014 (C. A. 7), certiorari denied, 342 U. S. 815.

Finally, to limit back pay only to the situation where reinstatement is also directed would work absurd results. It would mean, for example, that back pay could not be awarded (1) when the employee has found a better job and does not wish to be reinstated; (2) when the employee has incurred an intervening physical disability and is not qualified for reinstatement; (3) when he has been reinstated prior to the Board's order but has not received back pay for the period during which the discrimination persisted; or (4) when the employer has since discontinued his business so that there is no longer a job to which the employee can be reinstated.

It is clear, therefore, that the proviso is intended to illustrate, not to limit, the affirmative action the Board is authorized to order, and that the Board may issue a back pay order against the union without a companion reinstatement remedy against the employer.

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[30] S. Rep. No. 105, 80th Cong., 1st Sess., 38; see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 13.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

WALTER J. CUMMINGS, Jr.,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

BERNARD DUNAU,

ELIZABETH W. WESTON,

LOUIS SCHWARTZ,
Attorneys,
National Labor Relations Board.

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